Supreme Court of the United States

OCTOBER TERM—1945

No.

CHESTER BOWLES, Administrator, Office of Price Administration,

Respondent,

against

870 SEVENTH AVENUE CORPORATION, doing business as THE PARK CENTRAL,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement as to the Facts

The Budget Plan

The petitioner, the Park Central Hotel, one of New York City's largest, has more than 1,500 rooms. Some years ago, experiencing financial difficulties (172, 178-9), it devised a "Budget Plan" lease, applicable to a limited number of its rooms and unique among hotels in New York City. The Plan was attractive to persons who sought escape from the problems of house or apartment living. It was offered for a yearly term at a fixed monthly rental, and it embraced four features (see 172-3):

1) A lease of a room or suite in the hotel for two or more guests;

2) laundry service for each person of a value of $2.50 weekly;

3) valet service for three suits or dresses weekly for each person; and

4) dinner every night for each person in the Hawaiian Room, which is one of the hotel's restaurants.

The 1942 Leases; Not Offered After October 1942

Prices under the Budget Plan were fixed in the summer of 1942 in leases involving 321 of petitioner's rooms. Each of the leases was for a yearly term beginning October 1, 1942. Some of them were signed as early as June 1942 (findings X-XVI, fols. 379 *et seq.*). Most of them were for two-room unfurnished suites. The rentals varied from $125 to $200 or more monthly, depending principally upon the number of persons occupying the suite.

Petitioner made upon its books an allocation of the rental among the different services embraced in the Plan. Where —the typical case—the monthly rental was $150 for two persons, an allocation was made of $90 to rent, $31.84 to meals, and $21.68 to laundry. No separate allocation was made to valet service, the cost of which was borne by the petitioner under a sliding-scale arrangement with a concessionaire (174-5).

The menus in the Hawaiian Room carried no prices, but under the terms of the Budget Plan lease any tenant was privileged to discontinue taking dinner in the Hawaiian Room, and in such event a refund was made of 50 cents for each dinner not taken (177). This refund roughly approximated the amount allocated on the books for the dinners, which obviously were provided at a price materially below either cost or fair value.

In the leasing season for the fall of 1943 the petitioner declined to continue to offer Budget Plan leases upon the terms which had theretofore been offered. This was natural, in the light of the increasing onerousness of those terms upon it with the rapidly rising price structure during the period (see pp. 15-19, *infra*). In fact, the petitioner did not, after the summer of 1942, make any such offer to anyone (179). The District Court found, upon the uncontradicted evidence, that no Budget Plan lease was offered to anyone either during the base period April 4-10, 1943 or for "many months prior" to that period (finding XXXI, fol. 395).

The Only Offer During the Base Period

There was one kind of offer which the petitioner did make, during 1943 and including the base period, of dinners in the Hawaiian Room. Budget Plan tenants had the privilege of bringing their guests into the Hawaiian Room for dinner. One hundred and forty-seven guests were served during the base period. The charge for each such dinner was $1.50. Such was the *only* offer made during the base period, and the District Court so found (*cf.* findings VIII and XXXI, fols. 378, 395).

Price Rises and the 1943 Leases

As stated, the period immediately succeeding the making of the Budget Plan leases in the summer of 1942 was one of rising prices (305). The District Court specifically so found with respect to "basic raw material food costs, as well as labor and other operating costs in the Hawaiian Room" (finding XXX, fol. 395). The Office of Price Administration has given official recognition to the fact that these factors caused an increase in restaurant prices generally in the interval between September 1942 and April 1943 (see pp. 19-20, *infra*). But, because of its outstanding leases, the petitioner was not free to increase its

prices and it did not do so until the leases ended on September 30, 1943.

In the summer of 1943 some of the leases were renewed for the year beginning October 1, 1943. But for the reasons stated the same terms were not offered. The rentals were increased upon a uniform scale: $25 monthly for one occupant, $35 for two, and $45 for three (37-9, 44; findings XXI-XXVII, fols. 388-93). This increase was attributable, and was attributed, to the dinners served to the tenants and not to rental for the suite. All of the increase was so allocated upon petitioner's books (180). The bills rendered monthly to each of the Budget Plan tenants after November 1, 1943 also specifically so allocated the charges between room rental and dinners, and showed all of the increase to be in respect of the dinners * (findings XVIII-XX, fols. 384-8; XXVIII, fols. 393-4). Moreover, the refund for each meal not taken was increased to 75 cents (139).

Still the meals were furnished at a price considerably less than cost. The increase of $35 monthly in the 1943 leases meant only an allocation of $66.84 monthly for the dinners, or approximately $1 each. A fair estimate of the actual cost of the meals would suggest a much higher figure (181 *et seq.*). The menus are in evidence; and other proof shows that the dinners, which the tenants found satisfactory, as their affidavits show, were worth $1.75 to $2 (193-204, 208-13).

In November 1943 the Office of Price Administration made an inquiry in order to determine whether the increase was in violation of the Regulations fixing maximum hotel rentals at March 1943 levels (40-1, 276). No action was taken under those Regulations, doubtless upon the

* Prior to November 1, 1943, the monthly bills were rendered in a lump sum amount. The Rent Regulation for Hotels and Rooming Houses in the New York City Defense Rental Area (sec. 3(e)), effective November 1, 1943, required such specific allocation to be made in the bills rendered.

ground that the increase was in the charge for the dinners and that the Housing or Hotel Regulations do not govern.

The Restaurant Regulation

The present action is therefore brought upon the theory that the increase violates the Regulation covering eating and drinking establishments in New York City—specifically, section 2, Restaurant Maximum Price Regulation No. 2-1—Eating and Drinking Establishments—Food and Drink Sold for Immediate Consumption, effective July 26, 1943 (8 F. R. 10436, 12445, 15450). The Regulation is appended herewith (Appendix II).

The Courts below have endorsed that theory. The District Court issued its injunction permanently restraining the petitioner from charging its Budget Plan tenants any price "beyond that *prevailing* during the base period April 4 to April 10, 1943" (361), and the Circuit Court of Appeals for the Second Circuit has affirmed that determination. The italicized language of the judgment constitutes a significant departure from the text of the Regulation itself, which does not employ that language.

POINT I

The judgment below is contrary to the intent of the Maximum Price Regulation to allow to restaurant owners the benefit of the rise in restaurant prices prior to April, 1943.

Petitioner has been held to have violated section 2 of Restaurant MPR 2-1:

> "SEC. 2. *How you figure maximum prices for food items and meals you offered in the seven-day period from April 4, 1943 to April 10, 1943.* Your maximum price for any food item or meal which you offered in the seven-day period beginning Sunday, April 4, 1943,

and ending Saturday, April 10, 1943, is the highest price at which you offered the same food item or meal in that seven-day period." *

It is important to emphasize the precise text. It fixes the maximum price at "the highest price at which you *offered* the same food item or meal" during the base period. We shall submit that in its choice of the word "offered"—rather than the word "sold", or "charged"—the language used exactly expresses the underlying purpose: to fix prices for food at the levels offered during the base period, and not at the levels contracted for during earlier periods.

The decision below, which freezes petitioner's prices to its Budget Plan tenants in the Hawaiian Room at the levels negotiated in the summer and fall of 1942 *and not thereafter offered,* is not authorized by the Regulation. This may be demonstrated by examination of (a) the history and background of the Regulation; of (b) the official declaration of the Price Administrator accompanying his promulgation of the nationwide Restaurant Regulation; and of (c) the language of the Regulation itself.

A

The History and Background of the Restaurant Maximum Price Regulation

The Emergency Price Control Act of 1942

The immediate history of Restaurant MPR 2-1 begins with the Emergency Price Control Act of 1942, approved

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* The specific prohibition against exceeding maximum prices is in section 1:

"Section 1. *Sales at higher than maximum prices prohibited.* If you own or operate a restaurant, hotel, bar, cafe, club, delicatessen, soda fountain, boarding house, or any other eating or drinking place, you must not offer or sell any 'food item' (including any beverage) or 'meal' at a price higher than the maximum price which you figure according to the directions in the next two sections (sections 2 and 3). You may, of course, sell at lower than maximum prices."

January 30, 1942 (Public Law No. 421, 77th Cong., 2nd sess., 56 Stat. 23).* It vested direct authority in the Price Administrator to establish, by Regulation, maximum prices for all articles, products and materials, whether at manufacturer's, wholesaler's or retailer's levels.† He was enjoined to establish "fair and equitable" prices, and he was specifically directed to take into account increases in costs occurring subsequent to an indicated base period in October, 1941 (sec. 2(a)). As we shall see, he did so when the Restaurant Maximum Price Regulation was announced.

The Emergency Price Control Act left certain obvious gaps in the dikes against inflation. It carried a special provision for agricultural commodities, authorizing maximum prices not less than 110% of parity (sec. 3(a)). It has been authoritatively stated that this provision constituted "a formidable spiralling force, exerting upward pressure" on all prices (*Ginsburg, supra,* at p. 38). Neither did the legislation affect wages or salaries.

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* This was the first statutory attempt at direct control of prices. The Advisory Commission to the Council for National Defense, established May 22, 1940, had maintained a Price Stabilization Division, which did issue price schedules for certain commodities, without, however, any available sanctions (see Ginsburg, *The Price Control Act: Authority & Sanctions,* 9 Law and Contemporary Problems 22-25). The Office of Price Administration and Civilian Supply (OPACS) (6 F. R. 1917), established April 11, 1941, by Executive Order 8734, could allocate priorities and commandeer private property, but again had no direct methods of control over prices.

† "SEC. 4(a). It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under Section 2, or of any price schedule effective in accordance with the provisions of Section 206, or of any regulation order or requirement under Section 202(b) or Section 205(f) or to offer, solicit, attempt, or agree to do any of the foregoing."

The General Maximum Price Regulations; Restaurant Prices Exempted

The General Maximum Price Regulation of April 28, 1942 followed soon after (7 F. R. 3153)—the great overall regulation of prices.

The Act requires the Administrator to issue a "statement of considerations" with every Regulation (sec. 2(a)). In his statement accompanying the General Maximum Regulation, he pointed out that the General Price Maximum Regulation was not a panacea against inflation, but rather served as an indispensable setting for fully effective measures. He referred to certain companion measures necessary to any effective universal price ceiling: control of wages, profits and fiscal policies; an effective war labor policy; and a more stringent income and excess profits tax, plus greatly enhanced savings. He expressed the hope that in the meanwhile the Regulation would serve to end the pressure of labor for higher wages and so enable businessmen to stabilize prices.*

It was recognized however that until adoption of these companion measures, establishment of maximum prices in certain industries would be neither "fair" nor "equitable". Accordingly Supplementary Regulation No. 1, issued simultaneously, created certain exceptions. The restaurant business was one of them. Supplementary Regulation, Art. III, sec. 3.2, subd. (3)(e) declares the General Maximum Price Regulation inapplicable to "sales and delivery by hotels, restaurant * * * and other similar eating establishments, of meals, serving of food portions * * *."

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* Economists were less optimistic, and very early recognized that the measure could not be sufficiently effective. One authoritative study announced that the continuing upward movement in prices was "chiefly due to increases in prices of agricultural products and in wage costs", and that "it is obvious that the Office of Price Administration has no effective control over the price system as a whole" (Jacobstein & Moulton, *Effects of The Defense Program on Prices, Wages and Profits,* The Brookings Institution, September 30, 1941, p. 39, and see generally 41-3; see also Hirsch, *Price Control in the War Economy* (Harper & Bros. 1943), ch. 4, p. 37).

The necessary companion measures were some time in coming.

Wage Stabilization—October 1942

The next step was the Stabilization Act of 1942, approved October 2, 1942 (Public Law No. 729, 77th Cong., 2nd sess., 56 Stat. 265). Food costs were then rising at the rate of 40% annually, and wages at the rate of 1% monthly; a serious inflation was inevitable if more rigid controls were not imposed (Sen. Rep. No. 1609, September 19, 1942, 77th Cong., 2nd sess.).

This legislation made two important strides. It authorized stabilization of wages, salaries and prices (sec. 1), and on October 27, 1942 the Director of Economic Stabilization issued regulations freezing wages and salaries as of specific dates in October, 1942 (Code of Fed. Reg., tit. 32, subchapter A, Chapter XVIII, part 4001; sec. 4001.10). The legislation also reduced the maximum prices of agricultural commodities to parity or the highest price during the preceding nine months, whichever was higher (sec. 3).

Thus certain necessary companion measures to the Emergency Control Act, involving controls over agricultural commodity prices and upon wages and salaries (superimposed upon existing controls of prices and rents) were brought into being. But they failed of effectiveness. The agricultural provisions still strongly tended to inflation; and increases in wage scales were authorized too widely. The "continued rise of the cost of living threatened a new crisis" (5th Quarterly Report of the Office of Price Administration, April 30, 1943, 78th Cong., 1st sess., House Doc. No. 302, pp. 1 and 7). Especially was the rise in food costs disturbing (6th Quarterly Report of the Office of Price Administration, June 30, 1943, 78th Cong., 1st sess., House Doc. No. 358, pp. 7 and 8; see also 4th Quarterly Report, January 31, 1943, pp. 5 and 6).

Under such conditions, no effort was made to fix maximum restaurant prices.

The "Hold the Line" Order, April 8, 1943

The necessary measures were taken by the famous "hold the line" order of the President issued April 8, 1943 (8 F. R. 4681—Executive Order 9328, Supplemental Stabilization Order on Wages, Salaries and Prices). Its effect, bluntly, was to prevent any *further* increases in agricultural commodity prices, and with narrow limitations to freeze wages and salaries except to the extent authorized by the Little Steel formula.*

Restaurant prices had not been subjected to specific controls during the entire period preceding this "hold the line" order of April 8, 1943. The omission was not inadvertent. On the contrary—the Price Administrator stated expressly that regulation of restaurant prices became appropriate only in the light of the conditions first made possible by the "hold the line" Order (p. 19, *infra*). When that Order issued, steps were immediately taken to freeze restaurant prices. But the level was fixed with the purpose of accommodating restaurant price increases occurring prior to the Order.†

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* The order stated in part (78th Cong., 1st sess., Senate Doc. No. 25):

> "The Executive Order I have signed today is a hold-the-line order. To hold the line we cannot tolerate further increases in prices * * *.
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> * * * * * *
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> All items affecting the cost of living are to be brought under control. No further price increases are to be sanctioned unless imperatively required by law.
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> * * * * * * *
>
> Under the Act of October 2, 1942, Congress directed that so far as is practicable, wages, salaries and prices should be stabilized as of the level of September 15. Under that direction inflation has been slowed up. Now we must stop it."

† It was not intended to roll back prices generally. As the President stated in his message accompanying Executive Order 9328: "some prices affecting the cost of living are already above the levels of September 15, 1942. All of these cannot be rolled back." The message states that *only the "excessively high, inequitable or unfair" prices* were to be rolled back, and frozen at levels lower than those reached in the open market in April, 1943.

The first step by the Price Administrator, on April 12, 1943, was his General Order 50, requiring all restaurants to file their menus during the period April 4-10, 1943 (8 F. R. 4808; subd. (a)). This Order gave plain warning of imminent regulations freezing restaurant prices. The Order also delegated the authority to fix maximum restaurant prices to the Regional Price Administrators (subd. (e)).

Every Regional Administrator has promulgated appropriate regulations. Each has specified the base period April 4-10, 1943 (see Appendix 1). The Regulations for New York City, as has already been stated, became effective on July 26, 1943 (see Appendix 2, *infra,* at sec. 24).

On June 29, 1944, the Price Administrator established a uniform nationwide Restaurant Regulation—Restaurant MPR 2. It defines the maximum price in essentially the same language as used in the Regulations of the New York City Regional Director, under which the present action is brought.*

The conclusions from this brief history seem to us inescapable. Because labor costs and the cost of food which is their basic commodity were not then stabilized, restaurants were specifically excepted from the General Maximum Price Regulation which issued in April, 1942. It could not be considered "fair and equitable" to fix restaurant prices until effective controls had been established over both those factors. And since such controls were not established until the "hold the line" order in April, 1943, restaurant price controls were not earlier established. The Regulation was not designed—its history denies such purpose—to impose as maximum prices the prices established by the petitioner in the summer of 1942 *before* these effective basic controls were devised.

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* Section 1(a). *"General rule.* Your ceiling price for any 'meal', 'food item', or 'beverage', except coffee, is the highest price at which you offered the same meal, food item, or beverage between April 4 and 10, 1943."

The Circuit Court of Appeals saw a different purpose in the Regulation: to fix maximum prices at the highest prices "actually *established*" during the base period. Similarly the Court imputed to the Price Administrator an intention to stabilize prices at the level "actually *charged*" during the base period. We find nothing in the background of the Regulation itself which is here reviewed which gives support to any such conclusion. We turn to the statement of the Price Administrator himself.

B

The Price Administrator's Statement

In his statutory Statement of Considerations published with Restaurant MPR 2 on June 29, 1944, the Price Administrator in a few brief paragraphs stated precisely the considerations we emphasize:

> "From the beginning of price control the Office of Price Administration has been cognizant of the ultimate necessity for controlling the prices charged by eating and drinking places. Although the sale of prepared foods by eating and drinking places was exempted when the General Maximum Price Regulation was issued on April 28, 1942, this exemption was founded entirely upon temporary considerations of expediency. *Perhaps the main consideration was the fact that effective control had not yet been devised for the wages and raw food costs which make up the major portion of the expenses which enter into the final price calculations of eating or drinking places.* At the time the exemption was granted it was recognized that the exemption would sooner or later have to be withdrawn and some effective means of restaurant control instituted.
>
> *By April, 1943, controls had been established over raw food and labor costs and at the same time, restaurant prices in general had risen sufficiently to enable operators easily to absorb all intervening cost increases.* This was the situation at the time the President issued Executive Order No. 9328 on April 8, 1943.

> By this Order price control agencies were directed 'to take immediate steps to place ceiling prices on all commodities affecting the costs of living.' Accordingly, on April 12, 1943, the Price Administrator issued General Order No. 50, * * *" (see Appendix 1, p. 28 *et seq., infra*).

The decision below, however, denies to the petitioner the benefits of this underlying purpose "to enable operators easily to absorb all intervening cost increases".

The opinion of the Circuit Court of Appeals refers to the further statement of the Price Administrator that the Price Regulation "is primarily a regulation which freezes the maximum prices of eating and drinking places * * * to the April 4-10, 1943 levels". No one disputes that this is an accurate general description of the effect of the Regulation upon the vast majority of restaurant owners—indeed upon all except the very few in petitioner's unique position. But it is clear that the Price Administrator also had the specific purpose in mind to give restaurant owners the benefit of the increase in prices occurring before April 1943. This general description of a general purpose is hardly to be seized upon as expressive of an intention to override the specific purpose so explicitly recorded.

The Circuit Court recognized that its interpretation of the Regulation results in hardship for the petitioner and it discoursed somewhat philosophically on the economic consequences of wartime regulations while at the same time resisting the suggestion that the Court itself could afford relief. The Court, however, misconceived the petitioner's purpose in pointing out the unfairness, indeed the discriminatory nature, of an interpretation which binds it alone to prices which were fixed in September 1942 or earlier. The petitioner is not asking the Court "to amend general administrative orders". On the contrary, the petitioner's purpose in portraying the background of the Regulation is to show that the interpretation here made of the Regulation inflicts upon restaurant owners the very

hardship which it was the purpose of the Price Administrator to avoid.

The petitioner is seeking an interpretation of the Regulation consistent with the Price Administrator's purpose to spare restaurant owners the hardship which he recognized would result from fixing their prices at levels prevailing before April 1943. To suggest, as did the court below, that the petitioner might apply for relief under section 19 of the Regulation is to beg the question—the Regulation does not bar the increase in petitioner's prices, and there is no need for the petitioner, *defendant* in this action, to seek any affirmative relief.

The Circuit Court of Appeals indicated, however, that in its view the Regulation is so "clear and unambiguous" as in any event to override whatever statement of his purpose the Administrator might have made. We therefore turn to examination of the Regulation itself.

C

The Language of the Regulation

The language employed in the Regulation precisely expresses its purpose to accommodate the rise in restaurant prices during the six months or more preceding the base period.

In defining maximum price, the Regulation employs only the word "*offered*". It limits maximum prices to the highest prices at which the food was "offered" during the base period (pp. 12-13, *supra*). Petitioner did not in April 4-10, 1943 *offer* meals in the Hawaiian Room to its Budget Plan tenants at the prices fixed by the 1942 leases. The Court below explicitly so found (finding XXXI). Yet the judgment compels petitioner to adhere to those prices.

It is not necessary to maintain that the draftsman of the Regulation employed the word "offered" with the conscious and deliberate purpose to exclude the petitioner's situation, even though the Regulation, read literally, has such effect. It is enough that the draftsman did intend to

give to restaurant owners the benefit of the rise in restaurant prices which had occurred in the months prior to the base period in April, 1943, and that his language exactly expresses that intention. The Regulation was not designed to discriminate against the petitioner whose arrangements are unique in the City of New York, and to limit it to prices negotiated on a lower level many months before the base period.

The Administrator had at his command language which, if he had so desired, would have fixed the petitioner's price level at that lower level of 1942. He used such language in other Regulations governing the general price structure. The General Maximum Price Regulation (from which restaurants are excepted) defines the maximum price as "the highest price *charged* by the seller during March 1942" (sec. 2). The purpose underlying that Regulation was to freeze prices for commodities at the price levels then prevailing, regardless of the time when the price was actually fixed—and language was chosen appropriate to achieve that purpose (see pp. 19-20, *supra*). Similarly, the Regulations limiting rentals for Housing, and for Hotels and Rooming Houses, fix maximum rentals at "the rent" on the determinative date (in New York City, March, 1943), regardless of when the rent was fixed.*

Restaurant MPR 2-1 itself draws the distinction which we make. The text of section 1 is that "you must not *offer or sell* any 'food item' * * * or 'meal' at a price higher than the maximum price * * *." It would have been a simple matter for the draftsman, in section 2, similarly to have defined the maximum price as the price for which the petitioner *offered or sold* its meals to its Budget Plan tenants during the base period (or as the price *charged* by the petitioner). The choice, however, to define the

* These Regulations became effective in New York on November 1, 1943. They established March 1, 1943, as the maximum rent date for Housing, and the period February-March, 1943, as the base period for Hotels and Rooming Houses (sec. 4 of each Regulation, 8 F. R. 13910, 13914, Oct. 12, 1943).

maximum price exclusive in terms of "offer" demonstrates the fundamental design to impose only those prices prevailing during the base period which were then freely offered, unembarrassed by contract prices established many months prior.*

The Opinion Below

The Circuit Court nevertheless professes to find in the Regulation "clear and unambiguous terms" fixing ceilings at the highest prices "actually charged" during the base period. It draws a distinction between an offer of a price and an offer of a meal at a price, and it concludes that "the fact that the price for the meals offered was fixed several months before is irrelevant". There may be some dialectical difference between offering a price for meals during a base period and offering meals at a price during that period, but we are unable to understand how that distinction can affect the interpretation of the Regulation.

The District Court did not take this view of the Regulation. Recognizing that the plaintiff's interpretation of the Regulation encounters textual difficulty, it stated that "when one realizes the broad scope that the Regulation must have to be effective it must be apparent that the Regulation does reach out and cover this situation." Of course, this begs the question—*was* the Regulation intended to be so broad in scope? The District Court failed to look to the history of the Regulation for illumination as to its purposes (pp. 13 *et seq.*, *supra*).

The Circuit Court of Appeals appears to have been much influenced by a supposed analogy with the Rent Regulations for Housing, which concededly may so operate as to impose upon landlords rentals "which may have

* Observe how the judgment below overrides the language of the Regulation. The judgment prohibits any charge "beyond that *prevailing* during the base period"; it similarly prohibits any charge for meals "in excess of that *paid* by Budget Plan tenants during the base period" (fol. 361). It (and the findings and conclusions as well) studiously avoids the language of the Regulation.

been fixed by a lease negotiated years in the past". The analogy is, however, imperfect. The Housing Regulations have a different history. They were not issued in response to the "hold the line" order, but have been promulgated in the different defense districts at different times, both before and after April 1943. They were not imposed in New York, for example, until November 1, 1943. Their issuance depended upon other factors than stabilization of costs of food and labor. There is nothing in their history which suggests for a moment that the Price Administrator intended to give to landlords the benefit of any preceding rise in prices. On the contrary, the Rent Regulations always directly rolled back rentals, e.g., an eight months' rollback in New York City. Even the machinery for creating rent controls differed from the Restaurant Regulations—they could not be established until sixty days after the Administrator in that area declared that necessity existed for landlords to stabilize or reduce rents in the particular defense area (Emergency Act of 1942, sec. 2(b))—thus almost necessarily implying a rollback.

The Rent Regulations were plainly designed directly to roll back rentals to levels prevailing upon the day fixed in them as determinative, and the Circuit Court of Appeals could not fairly apply them by analogy.

POINT II

Petitioner's authorized maximum price in the Hawaiian Room under Restaurant MPR 2-1 is $1.50 per dinner.

The petitioner did offer meals in the Hawaiian Room during April 4-10, 1943, as was found below (see p. 10, *supra*). The offer was to guests of tenants; the price was $1.50. The offer was a convenience to tenants, who took their own meals under their leases at a much lower price.

But there is nothing in the text of the Regulation which limits the petitioner to the prices paid by the tenants rather than the prices offered their guests.

The regulation does not require that the price to Budget Plan tenants, or any individual tenant, be no more than they or he personally paid during the base period for their or his dinners.* The Regulation recognizes that different persons might have paid different prices, and on different days during the base period. So far as the text of the Regulation is concerned the owner may charge the highest price offered to anyone during the base period. The Budget Plan tenants had a special privilege by which they paid less, but the Regulation, literally taken, does not recognize any distinction between the Budget Plan tenants and other diners in the Hawaiian Room.

Nevertheless the plaintiff successfully argued below that such a distinction is implicit in the Regulation. Obviously this means not only a separate classification of Budget Plan tenants from other guests in the Hawaiian Room; it would also require each Budget Plan tenant to be placed in a distinct classification, since the allocated food cost varies from tenant to tenant depending upon the total rent charge (pp. 9, 11, *supra*).

We submit again that any such intent to authorize such classifications could easily have been written into this Regulation, as in the case of other Regulations. Classifications are established, for example, in the General Maximum Price Regulation.† Indeed, Restaurant MPR 2-1 itself

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* Sections 1 and 2 of the Regulations (see Appendix 1) provide only that maximum price "is the highest price at which you offered the same food item or meal in that seven-day period."

† Section 2 of the General Maximum Price Regulation expressly states that:

> "For the purposes of this General Maximum Price Regulation the highest price charged by a seller during March, 1942, shall be:
>
> (a) The highest price which the seller charged for a commodity 'delivered' or service 'supplied' by him during March, 1942, to a 'purchase of the same class'."

establishes other types of classification: the kind of meals and services, whether on Sunday or on a weekday or day or evening. But it fails to suggest any classification according to the types of persons served.

The District Court recognized that "the Regulation does not aim to make a distinction between classes of customers" (351). The Court read such classification into the Regulation, however, on the theory (to which we already referred, p. 23, *supra*) that the Regulation must be given a "broad scope" in order to be "effective" (352). But this is a fallacy, as we have fully shown under Point I. There is nothing in its history or its background which warrants reading into it any classification so devised as to roll back petitioner's prices to September 1942 levels.

The Circuit Court of Appeals relied also upon section 9(a)(2) of the Restaurant Regulations, as follows:

> "Sec. 9. *Evasion.* (a) You must not evade the provisions of this regulation by any scheme or device whatsoever. Some, but not all practices which will be regarded as evasive are: * * * (2) Withdrawing the offer, or increasing the price of any meal ticket, weekly rate, or other arrangement by which customers may buy food items or meals at less than the prices they must pay when purchasing by item or meal;"

The Court stated that the petitioner would be evading the Regulation if it increased the prices "for these tenants to that of guests", on the ground that the Administrator "evidently" intended to fix the price of food at the price at which it was sold "under the same arrangement" during the base period.

The Court misconceived the function of section 9. It must be read in the light of section 2—surely its draftsman, in referring to "evasion", did not intend to diverge from the essential definition of maximum price contained in section 2, the price at which the meal was *offered*. Section 9 therefore merely says that if the price for any individual meal is increased beyond the maximum legally

permissible for that meal by increasing the price of an arrangement such as is described, the increase will be regarded as an evasion of the Regulation. But the determination of that legally permissible price must nevertheless be made by reference to section 2 of the Regulation which defines the maximum price as the highest price at which the meals were "offered" during the base period. Otherwise the illustration in section 9 obliterates an essential element from the definition in section 2, carefully drawn though section 2 was.

Similarly, the description in section 9, taken literally and alone, would seem to prevent *any* increase in the price of the arrangement described. If anything is clear, however, it is that the Regulation does not prevent all increases. The prohibition is simply against charging a higher price than the maximum price at which the food was offered during the base period. It does not prohibit any increase in prices, so long as the highest price at which the food was offered during the period is not exceeded. The Court below erred in relying upon the loosely illustrative section 9 without at the same time reading into it the nicely worded definition from section 2.

The same error underlies the ruling of the District Court, which relied on this section 9(a)(2) to buttress its conclusion that the Regulation was intended to have sweeping effect and to embrace plans like the Budget Plan. The maximum price may be ascertained only by reference to section 2, and, as we have argued, that section limits petitioner only to the highest prices at which food was *offered* during the base period in the Hawaiian Room.

Respectfully submitted,

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